Table of Contents.

Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Reasons for granting the writ	5
Conclusion	16
Appendix A	17

Table of Authorities Cited.

Cases.

Bell v. United States, 349 U.S. 81	15
Blue v. United States, 342 F. 2d 894	4, 6, 7
Carlson v. United States, 274 F. 2d 694	14
Coleman v. Alabama, 399 U.S. 1	4, 8, 9
Coleman v. Alabama, Law Reprints, vol. No. 18 (New York), at 14	8n., 9
Corey v. United States, 305 F. 2d 232	10, 11
Heflin v. United States, 358 U.S. 415	15
Heideman v. United States, 281 F. 2d 805	15
Leary v. United States, 395 U.S. 6	4, 9, 10, 11
Lee v. United States, 363 F. 2d 469	10, 11
Prince v. United States, 352 U.S. 322	15
Rayborn v. United States, 234 F. 2d 368	14, 16
Roberts v. LaVallee, 389 U.S. 40	8
Ross v. Sirica, 380 F. 2d 557	4, 6, 7, 8
Tot v. United States, 319 U.S. 463	9, 10

United States v. Cardillo, 316 F. 2d 606 10, 11
United States v. DeCosta, 435 F. 2d 630 5
United States v. Doyle, 348 F. 2d 715 4, 5
United States v. Gainey, 380 U.S. 63 9
United States v. Ketchum, 320 F. 2d 3 15
United States v. Laub, 385 U.S. 475 13
United States v. Lubomski, 277 F. Supp. 713 12
United States v. Mamber, 127 F. Supp. 925 12, 15
United States v. Rabin, 316 F. 2d 564 10, 11
United States v. Regisser, 309 F. Supp. 879 7
United States v. Rocco, 99 F. Supp. 746 10, 11
United States v. Romano, 382 U.S. 136 9
United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 15
United States v. Webb, 433 F. 2d 400 5

STATUTES, ETC.

18 U.S.C.
Section 2 2, 9, 13, 14
Section 2311 3, 13, 14
Section 2314 3, 13, 14, 15
Section 2315 2, 4, 5, 9, 10, 13, 14, 15
Section 3060 8
28 U.S.C. § 1254(1) 1
Arizona Const. Art. 2, § 30 6
Code of Alabama, 1940 (recompiled 1958), Title 15, §§ 133-140 8n.

New Mexico Const. Art. 2, § 14 6

Federal Rules of Criminal Procedure, Rule 5 4
Federal Rules of Criminal Procedure, Rule 5 (c) 7
1 Belli, Modern Trials, 80-81 8

MISCELLANEOUS.

1961 Congressional History and Administrative News, pp. 3264, 3265 13
Federal Magistrate's Act, October 17, 1968 8
8 Moore, Federal Practice and Procedure 8
§ 5.04 [2] 8
§ 5.04 [4] 7
§ 8:03 [2] 12
Note 51, Iowa L. Review 164, 182 6
Poperno & Goldstein, Criminal Procedure in New York, 95 7
Wright, 1 Federal Practice and Procedure, § 142 12, 13

Supreme Court of the United States.

OCTOBER TERM, 1970.

No.

MARVIN T. KARGER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Opinion Below.

The opinion of the court below (App. A) is not yet reported.

Jurisdiction.

The judgment of the court below was entered on March 29, 1971. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the court below erred in concluding that a guilty plea entered in the District Court to a federal grand jury indictment operates to waive review of constitutional issues presented by pretrial motions and denied by the District Court.

2. Whether the court below erred in concluding that 18 U.S.C. § 2315 employs a lawful presumption and/or that this question was not before it for consideration.

3. Whether the court below erred in concluding that the indictment in this case was not defective because of multiplicity.

Statement.

On October 21, 1969, the petitioner, Marvin T. Karger, surrendered voluntarily when he became aware of an arrest warrant outstanding for him. On November 7, 1969, the petitioner appeared before Commissioner Robert Popeo at his preliminary hearing with employed counsel ready to call witnesses, subpoena witnesses and cross-examine government witnesses to test the existence of probable cause, but the government intentionally moved for dismissal (R. at 20-21).[1] At this time the government knew that the grand jury had not had the Karger matter submitted to it.

On November 20, 1969, the federal grand jury sitting in Boston, Massachusetts, returned a twenty count indictment, the first eighteen counts of which accused the defendant of violations of Title 18, United States Code, section 2 and section 2315, commonly referred to respectively as the Aiding and Abetting Act and (with violation of sections

[1] References are to the Appendix filed in the court below ("R."), and to the appendix to this petition ("App.").

2311 and 2314) the National Stolen Property Act (R. at 6-16).

All eighteen counts in the indictment are worded the same and are seemingly segregated by dates of allegedly illegal activity rather than by the number of bonds involved except for counts II and XVIII which are separated on the latter basis.

On November 20, 1969, a new warrant for petitioner's arrest was issued based on the return of the indictment. The petitioner was arraigned on December 8, 1969, in the United States District Court, District of Massachusetts, before Judge Anthony Julian (R. at 1). As can be seen from the relevant docket entries (R. at 1-6) in January, 1970, many pretrial motions were filed by counsel on petitioner's behalf, including memoranda of law in support thereof. Included among these motions were a motion to dismiss and a motion to abate or enjoin the prosecution and renew the preliminary hearing.

Argument on the pretrial motions was heard on April 6, 1970.[2] The District Court, on April 7, 1970, denied both the motion to dismiss and the motion to abate or enjoin the prosecution (R. at 19). On September 29, 1970, the petitioner changed his plea to that of guilty to all eighteen counts in which he was charged. After a recommendation of five years concurrent to all counts made by the Department of Justice, petitioner was sentenced to twelve years incarceration on October 14, 1970 (R. at 34-35).[3] Petitioner was removed to the federal penitentiary at Lewisburg, Pennsylvania, where he is presently located.

Petitioner filed his notice of appeal in federal District Court on October 23, 1970. Three issues, all raised by pre-

---

[2] The relevant portion of the transcript is R. at 22-34.

[3] Petitioner received a sentence of eight years on fourteen counts, to run concurrently, and four years on four counts, concurrent, from and after.

trial motions and denied by the District Court were argued by petitioner in the court below: the indictment was multiplicious; the petitioner was denied a preliminary hearing in violation of Rule 5 of the Federal Rules of Criminal Procedure; and, that 18 U.S.C. § 2315 is unconstitutional because it employs an unlawful presumption.

The government argued below that petitioner's plea of guilty was a waiver of all issues presented. The court below held that a guilty plea waives all claims directly related to the determination of guilt or innocence. As will be discussed below, it does not seem the court below rested its finding on waiver since it then did dispose of petitioner's issues singularly. Petitioner believes his issues are jurisdictional defects and thus not capable of being waived by a plea of guilty. *United States* v. *Doyle,* 348 F. 2d 715, 719 (2d Cir. 1965).

The court below, admitting that *Blue* v. *United States,* 342 F. 2d 894 (D.C. Cir. 1964) and *Ross* v. *Sirica,* 380 F. 2d 557 (D.C. Cir. 1967) were "troublesome," saw no efficacy in holding that a subsequent indictment rendered moot defects in a preliminary hearing. Petitioner argued that *Coleman* v. *Alabama,* 399 U.S. 1 (1970), further exemplified the logic that a right to counsel at a preliminary hearing is meaningless without the concomitant right to a full-fledged hearing, but the court below concluded that the discovery potential found inherent in the process by the District of Columbia Circuit Court of Appeals (*supra*), could be obtained at trial.

Petitioner further argued below that in operative fact, deduced from the cases tried using the presumption in 18 U.S.C. § 2315, petitioner faced an impossible burden if he chose to put the government to its burden at trial—since it would be petitioner's burden of proof. *Leary* v. *United States,* 395 U.S. 6 (1969). The court rejected this argument stating that it was of the view that the *Leary* presumption

was qualitatively different than the presumption in 18 U.S.C. § 2315 and that the issue was not justiciable as a hypothetical since no trial took place.

Finally, the court below rejected petitioner's claim that the government fragmented one scheme into multiple offenses, exemplified by counts II and XVIII of the indictment which dealt with the same date but different bonds while all other counts were segregated one from the other by dates and not bonds. The court below affirmed in full the judgment of the District Court.

Reason for Granting the Writ.

1. This case presents an important and far-reaching question dealing with the realities of the decision-making process of an accused when contemplating a change of plea. A preliminary hearing not only allows a criminal accused the opportunity for discovery but gives to him some additional leverage in the plea bargaining process which cannot be obtained by discovery at trial. Moreover, it is logical to conclude, as did the court below, that a presumption which places the burden of disproof on the accused at trial is a hypothetical question until a trial evolves—unless you are the accused contemplating the burden of having to rebut that presumption.

2. The court below concluded, in part, that it would follow *United States* v. *DeCosta,* 435 F. 2d 630, 632 (1st Cir. 1970) and *United States* v. *Webb,* 433 F. 2d 400, 403 (1st Cir. 1970) in which it concluded that a guilty plea waived the right to trial, the right to confront accusers and the right to be free from self-incrimination. These are non-jurisdictional defects. *United States* v. *Doyle,* 348 F. 2d 715 (2d Cir. 1965). An indictment which is multiplicious is an invalid indictment over which the court has no jurisdiction. A statute which employs an unlawful presumption is un-

constitutional and an indictment predicated on its validity is void. At least one federal circuit has held that a subsequent indictment does not render moot defects in a preliminary hearing. *Ross* v. *Sirica*, 380 F. 2d 557 (D.C. Cir. 1967); extending this same rationale, neither should a subsequent plea of guilty.

The petitioner, Marvin T. Karger, after becoming aware of an arrest warrant outstanding against him, surrendered himself voluntarily to Commissioner Robert Popeo on October 21, 1969. United States Commissioner Popeo released the defendant on $2,500 bail bond without sureties.

On November 7, 1969, the petitioner, represented by counsel, appeared before Commissioner Popeo for his preliminary hearing. The petitioner employed a stenographer whose transcript is in the appendix submitted below at 20-21. In brief, over the objection of defense counsel, who was prepared to produce witnesses and ask leave of the Commissioner to subpoena other witnesses, the United States Attorney intentionally produced no evidence and thus Commissioner Popeo was compelled to dismiss the hearing and release the petitioner. This, it is maintained, was a gross violation of petitioner's rights under the Federal Rules of Criminal Procedure and the United States Constitution.

The roots of our modern preliminary hearing are implanted in the history and theory of Anglo-American jurisprudence. Some trace this origin to the statutes of Philip and Mary enacted in 1554. Note 51, Iowa L. Rev. 164, 182 (1965). See also New Mexico Const. Art. 2, § 14 and Arizona Const. Art 2, § 30. Since due process encompasses those traditional common law rights regarded as fundamental, we suggested to the court below that the preliminary hearing falls within this category.

In *Blue* v. *United States*, 342 F. 2d 894, 901 (C.A.D.C. Cir. 1964), the purpose of the preliminary hearing was said to be (1) to allow the accused an opportunity to establish

a lack of probable cause for his continued detention and to thus avoid prosecution, and (2) to allow the accused a chance in advance of trial to learn the "foundations of the charge and the evidence that will comprise the government's case against him." If the government elects to begin the criminal process with a preliminary hearing rather than by indictment can these purposes be so fragile as to be disallowed completely when the government, for a tactical advantage, changes its strategy?

Mr. Karger, the petitioner, was proceeded against by the preparation for and institution of a preliminary hearing. His counsel was prepared to call witnesses present at the hearing, and subpoena others, and cross-examine government witnesses whose testimony would have been relevant to the issue of probable cause. Having changed its strategy, the government intentionally forced a dismissal of the preliminary hearing so as to be able to present its case to a grand jury for the return of an indictment in an insulated and isolated hearing. This the government then did securing the above numbered indictment (R. at 6-16).

Thus, it is apparent, that the limited discovery potential for the defendant proffered by the preliminary hearing is both ancillary to and part-and-parcel of the defendant's attempts to disprove the existence of probable cause. In both *Blue* and *Ross* the court held that the subsequent return of an indictment did not render moot the issue of alleged defeats in the preliminary hearing. Evidently the precepts of *Blue* and *Ross* are gaining strength in the District of Columbia Circuit. *United States* v. *Regisser*, 309 F. Supp. 879 (1970).

Rather than an irrelevant process, the preliminary hearing is a crucial stage in the criminal process. The accused can present witnesses in his behalf, Federal Rules of Criminal Procedure, Rule 5 (c), 8 Moore, Federal Practice and Procedure, § 5.04 [4], Poperno & Goldstein, Criminal Pro-

cedure in New York, 95 (1968). The hearing serves as an effective discovery tool.

The accused has the right to subpoena witnesses. *Ross* v. *Sirica,* 380 F. 2d 557 (D.C. Cir. 1967). The transcripts of preliminary hearings can be used in civil trials. 1 Belli, Modern Trials, 80-81 (1954). Another indication of the importance of the hearing is that before 1968 no reporter was required in the federal system. By the enactment of the Federal Magistrate's Act, October 17, 1968, a reporter is now provided and an indigent accused upon demand must be given a copy of the transcript. See 18 U.S.C. § 3060, as amended § 945, § 303 (1968), also *Roberts* v. *LaVallee,* 389 U.S. 40 (1967). As an indication of how seriously the bar takes the hearing, it is interesting to note that the incidence of demanding a hearing increases sharply when the accused is represented by counsel. 8 Moore, Federal Practice and Procedure, § 5.04 [2].

The court below was of the view that discovery could be obtained by an accused at trial if missed at the preliminary hearing. This in our view, incorrectly analyzes *Coleman* v. *Alamaba,* 399 U.S. 1 (1970). In *Coleman* this court recognized that the preliminary hearing was a critical stage in the Alabama criminal process. This was so even though the Alabama criminal code did not mandate that all criminal proceedings initiate by preliminary hearing.[4] It is petitioner's belief that this court, in *Coleman,* spoke specifically in terms of the importance of and critical nature of the preliminary hearing when the government uses it to initiate criminal proceedings. In appellants' brief, on behalf of John Henry Coleman and Otis Stephens, submitted to this court in *Coleman,* counsel argued that the preliminary hearing could and does serve many purposes.[5] This court in

[4] See Code of Alabama, 1940 (recompiled 1958), Title 15, §§ 133-140.

[5] *Coleman* v. *Alabama,* Law Reprints, vol. No. 18 (New York), at 14.

Coleman, we believe, agreed with appellants' perspective, as evidenced by its recognition of almost the exact critical features of the preliminary hearing advocated by Coleman's counsel.

We suggest that in the present case it is sheer speculation to assume the preliminary hearing would have had no benefit to the defendant and no ultimate significance as to subsequent events since an indictment was found against the defendant some time after the scheduled hearing. The defendant suffered arrest, trauma, the expenditure of funds for counsel and bail—all without reciprocity. *If the preliminary hearing, as in Coleman, is critical enough to mandate representation by counsel then the hearing itself is critical enough to prohibit the government to use it as a tactical vehicle which it can manipulate to its advantage.* The potential for harassment alone should itself dictate judicial repugnance for this activity.

3. The petitioner was charged with the alleged violation of Title 18, United States Code, section 2 and section 2315. This court in *Leary* v. *United States,* 395 U.S. 6, 53 (1969) quoted from *Tot* v. *United States,* 319 U.S. 463 (1943), where a presumption allowed the jury to infer from possession of a firearm that it was knowingly received from interstate commerce unless the defendant successfully explained his innocent possession. The court in *Tot* rejected the constitutionality of this presumption. In *Leary,* quoting its words in *Tot,* this court stated the controlling test with this type of presumption to be: "that there be a rational connection between the facts proved and the fact presumed." Thus *Tot* and *Leary* reduced the "argument of convenience," that defendant should have the burden of persuasion, to a corollary. 319 U.S. at 469. See also *United States* v. *Gainey,* 380 U.S. 63 (1965), and *United States* v. *Romano,* 382 U.S. 136 (1965).

Thus, this court stated, the presumption of possession in *Leary* authorized the jury to infer two necessary elements: that any marihuana possessed was illegally imported and that the defendant had knowledge thereof. The first presumption was held unconstitutional on its face, whereas the second was stated to be an issue determined by scrutiny of the available data, whether circumstantial or direct, regarding the beliefs of marihuana users. After an extensive perusal of the available data this court concluded the presumption was unconstitutional.

Though section 2315 does not explicitly postulate the use of a statutory presumption it does require a "knowing" violation. Moreover, the courts, when viewing this essential element of the offense, have often applied the exact same presumption, to wit: the possession of recently stolen fruits of crime raises a presumption that the possessor has knowledge of the stolen nature of the goods and of their interstate character. This shifts the burden of persuasion to the defendant to explain innocuous possession. The District Court categorized this element of the statute as allowing an "inference" to be drawn by the jury, rather than a presumption (R. at 32). Argumentation on the point was extremely minimal. It is our position that the case law, when dealing with the presumption of possession in section 2315, has elevated this so-called inference to a presumption and in reality it so operates. *United States* v. *Cardillo,* 316 F. 2d 606 (1963) and *United States* v. *Rocco,* 99 F. Supp. 746 (1951). See also *Lee* v. *United States,* 363 F. 2d 469 (1966), *United States* v. *Rabin,* 316 F. 2d 564 (1963) and *Corey* v. *United States,* 305 F. 2d 232 (1962).

Because the presumption implicit in section 2315 is so integral to the vast majority of convictions under the statute, since the essential element of proof upon the government is that of establishing "knowledge," this presumption is equally as obnoxious to due process as the presumption employed in *Tot* and *Leary.*

In those cases where the section 2315 presumption is most noticeable (see *Cardillo, Rocco, Lee, Rabin, Corey* and *Pearson,* all cited previously), there has been overwhelming evidence to support the inference of guilty knowledge. The evidence usually involves interstate travel of the defendant with the stolen goods, massive subterfuge and lying in disposing of the goods, name-changes, conspiracies and the like. Thus, the operation of the presumption, in cases like those just described, though we maintain its unconstitutionality, would not really affect the final disposition. In cases like the instant case there is a pure qualitative difference. The present petitioner's action and behavior could not be made analogous to any of the above-cited cases. The defendant did not travel, he is a businessman with a source of income which requires his constant attention in Massachusetts, he never practiced any deception of identity or transaction, he received legal consultation that was both respectable and timely, he did not have exclusive control of any transactions or the subjects thereof, he did not receive anywhere near the compensation involved in the above-cited cases and finally, but by no means unimportantly, he voluntarily surrendered to authorities immediately upon notification that he was being sought for a criminal offense. It is our belief that a greater standard need be utilized here because this presumption, unlike others which shift the burden of producing evidence, also effectively shifts the burden of persuasion; thus, a silent defendant will in all likelihood, in every instance, be found guilty without having that guilt arguably presented to the trier of fact. This is so imprecise and so arbitrary that it cannot be deemed compatible with due process.

The court below held that this question was an evidentiary question waived along with petitioner's right to trial. Petitioner contends this court should decide whether this type of presumption, as employed in *Leary,* does not make a criminal statute inherently invalid.

4. This indictment was returned and filed in the clerk's office of the United States District Court for the District of Massachusetts on November 20, 1969 (R. at 1). The face of the indictment reveals a severe inconsistency. Firstly, in all counts in the indictment one to eighteen, mentioning the petitioner, excluding counts II and XVIII, all allegedly stolen bonds dealing with a specific date are made the subject of one count. Thus these counts are supposedly separated by dates. Counts II and XVIII, however, both deal with allegedly stolen bonds which concern the same date. This gives rise to the inference that the government was intentionally attempting to have the grand jury fragment the alleged offense. Secondly, the further inference appears that the government fragmented a single offense into eighteen separate counts.

"Multiplicity" is the charging of a single offense in more than on count. *United States* v. *Mamber,* 127 F. Supp. 925, 927 (D.C. Mass. 1955); *United States* v. *Lubomski,* 277 F. Supp. 713, 716, footnote 2 (D.C. Ill. 1967); Wright, 1 Federal Practice and Procedure, § 142 (1969); 8 Moore, Federal Practice and Procedure, § 8:03 [2], pp. 7-8. The government in the instant case attempted to fragment one crime into eighteen distinct and separate crimes for the purpose of increasing petitioner's liability for punishment, and, if not that, for the purpose of obtainng an unfair psychological advantage at trial.

> "This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country." (As amended Oct. 4, 1961, Pub. L. 87-371, § 3, 75 Stat. 802.)

Here, the petitioner contends he should have been charged with the transgression of one law, namely, 18 U.S.C. § 2315. The legislative intent of the statute as evidenced by its history clearly supports this view. Professor Wright states that the question of whether one offense is separate from another is to be ascertained from an examination of the legislative intent. Wright, 1 Federal Practice and Procedure, § 142, p. 312, cases cited at n. 30.

Professor Wright continues by stating that: "Since a determination that separate offenses are involved makes possible multiple punishment for the same conduct unless Congress has *indicated clearly* that it contemplates separate crimes doubt will be resolved against turning a single transaction into multiple offenses." 1 Wright, *supra,* 312-313. (Emphasis supplied.) "Crimes are not to be created by inference. They may not be constructed *nunc pro tunc.*" *United States* v. *Laub,* 385 U.S. 475, 487 (1967).

18 U.S.C. §§ 2311, 2314 and 2315 were amended in 1961 to add the words "or tax stamps" to those articles encompassed by the laws. In speaking of the statutes in general the Congress said: (1) the tax stamp was obviously of immediate concern to state, and (2) it "is further necessary to recognize that the appeal for legislation in this instance has resulted from the basic interstate character of the criminal activity involved in the traffic of fraudulent tax stamps. Accordingly, in amending H.R. 1777 the committee has focused upon the interstate aspect of that activity." 1961 Congressional History and Administrative News, pp. 3264, 3265.

Thus, no matter what the specific article is that is prohibited by § 2315 from being "received," etc., the gravamen of the offense is its movement in interstate commerce and the accused's knowledge of its stolen character and interstate transport. Likewise, to prove a defendant guilty of § 2 on any count in an indictment of this type would require

a prior proof of the interstate element of § 2315, in fact it would require the same proof. Thus, if a defendant cannot have his alleged offense fragmented on the basis of § 2315, he cannot have it done with regard to § 2. This is because § 2 will not and does not apply to an innocent agent or instrumentality. See 18 U.S.C. § 2, notes.

It is often said that the test of identity of offenses is whether the same evidence is required to sustain them. *Rayborn* v. *United States,* 234 F. 2d 368 (1956). In cases under 18 U.S.C. § 2311 to § 2314 consecutive counts and sentences have been imposed, but only when the congressional intent has been clearly so stated. *Carlson* v. *United States,* 274 F. 2d 694, a four count indictment alleged interstate transportation of "forged" checks in violation of § 2314. Distinguishing this activity with "forged" checks which comes under paragraph three of § 2314 from "securities" in paragraph one of § 2314 this court said:

> "Under the first paragraph of 18 U.S.C. § 2314, as a securities 'stolen, converted or taken by fraud,' such a combined transportation gives rise to only one sentenceable offense. But this is because Congress has seen fit to make an interstate transportation of securities of this character constitute a federal offense only where 'the value of $5,000 or more' is involved" (at 695-696).

This, we submit, is analogous to § 2315 which also has a $5,000 statutory criteria and whose fulcrum is interstate commerce.

In this case there was one transaction alleged by the government, which, for the convenience of the prosecution, has been factually fragmented into more than one count. The grand jury has no authority to divide a single continuous offense growing out of one transaction and involv-

ing one continuous period of time into such parts as it or the government pleases and call each part a separate offense. *Bell* v. *United States,* 349 U.S. 81 (1955).

Having shown previously that the legislative intent in § 2315 was to prohibit the use of interstate commerce for the benefit of the various offenses listed, whether under the "same evidence" test or the "congressional intent" test, the result is identical unless the testimony before the grand jury differed radically from what we believe to be the facts. There was at most one alleged crime to be charged here, not two, and certainly not eighteen. The arbitrariness of the indictment is exemplified by counts II and XVIII. Both deal with different bonds, yet a single date, whereas the other counts are divided by dates and not bonds.

If the "congressional intent" test is applicable, as we believe, separate convictions and sentences may be imposed for multiple offenses arising out of the same criminal act only if Congress clearly so intended; any ambiguity related to this determination must be resolved in favor of the defendant. *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218 (1952); *Prince* v. *United States,* 352 U.S. 322 (1957); and *Heflin* v. *United States,* 358 U.S. 415 (1959).

This indictment is also obnoxious to our sense of fairness because the fragmenting of a single continuous offense, the identical basic proof of which is essential to every count in the indictment, can be used by the government as a prolix pleading for its psychological effect upon judge or jury. This has not been ignored in the courts; it has been condemned. *United States* v. *Mamber,* 127 F. Supp. 925, 927 (1955), and *United States* v. *Ketchum,* 320 F. 2d 3 (1963).

Furthermore, this Court should conclude that due process is violated by degree. In *Heideman* v. *United States,* 281 F. 2d 805 (1960), where each "forged" security in a transportation case, under the third paragraph of § 2314,

was made the subject of a separate count, though permissible, the court said:

> "But the use of multiple counts in a case like the present should not cause the actual degree of criminality in the act charged to be exaggerated and magnified beyond reason" (at 809-810). See also *Rayborn* v. *United States,* 234 F. 2d 368, 371 (1956).

Conclusion.

In short, petitioner was confined within a situation where he was initially unable to demonstrate to the Department of Justice that their case was weak, where he contemplated a trial having to himself carry the burden of persuasion against a usually prevailing presumption and finally, where he confronted a prolix pleading which had to influence the jury against him. This occurrence, which petitioner faced, should be rectified for him and for the uniformity and essential fairness of our criminal processes. It is therefore respectfully submitted that the petition for a writ of certiorori should be granted.

Respectfully submitted,

JOSEPH S. OTERI,
MITCHELL BENJOYA,
CRANE, INKER & OTERI,
20 Ashburton Place,
Boston, Massachusetts 02108.

Appendix A.

United States Court of Appeals for the First Circuit.

No. 7782.

UNITED STATES OF AMERICA,
APPELLEE,
v.
MARVIN T. KARGER,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before ALDRICH, *Chief Judge,*
MCENTEE and COFFIN, *Circuit Judges.*

Mitchell Benjoya, with whom *Joseph S. Oteri* and *Crane, Inker & Oteri* were on brief, for appellant.

Frederick W. Read III, Attorney, Department of Justice, with whom *Sidney M. Glazer,* Attorney, Department of Justice, and *Edward F. Harrington,* Special Attorney, Department of Justice, were on brief, for appellee.

March 29, 1971.

COFFIN, *Circuit Judge.* This is an appeal by the defendant following a plea of guilty to an indictment alleging eighteen separate violations of 18 U.S.C. § 2315. That section of the Criminal Code imposes a sentence of up to ten years imprisonment for knowingly pledging as collateral for a loan stolen securities of at least $500 in value, which have moved through interstate commerce. Defendant changed his plea to guilty after unsuccessfully raising in pre-trial motions the three issues he now raises on appeal. Before we consider the merits of these issues, we must first determine whether defendant's plea of guilty waived his right to appeal these decisions.

We have recently addressed ourselves to the issue of what claims are waived by a guilty plea. *United States* v. *DeCosta,* 435 F.2d 630, 632 (1st Cir. 1970); *United States* v. *Webb,* 433 F.2d 400, 403 (1st Cir. 1970). While we have indicated reluctance to hold that a guilty plea waives all claims, we have ruled that a guilty plea waives claims directly related to the determination of guilt or innocence, such as the privilege against self incrimination, the right to a jury trial, and the right to confront accusers. The three issues raised on this appeal either fall within this category of claims or are otherwise of no merit.

Defendant claims first that he was denied a preliminary hearing. After he was originally charged with the crimes to which he eventually pleaded guilty, the government moved for dismissal on the very day for which the hearing was scheduled and then proceeded against defendant by indictment. Defendant claims he was thus deprived of his right to a preliminary hearing, citing the cases of *Blue* v. *United States,* 342 F.2d 894 (D.C. Cir. 1965); *Ross* v. *Sirica,* 380 F.2d 557 (D.C. Cir. 1967). These cases, which as far as we know have not been followed in any other circuit, are troublesome. But even assuming that we fol-

lowed these cases and that they required all criminal defendants to be given preliminary hearings, we cannot see how a defendant who pleads guilty can later complain of a denial of a preliminary hearing. The District of Columbia cases pointed out two interests that criminal defendants have in a preliminary hearing: the opportunity to demonstrate at an early stage in the criminal process that the government lacked probable cause to hold the defendant and the opportunity to discover the government's case. A plea of guilty necessarily admits that the government had probable cause, and a defendant who chooses not to put the government to its proof cannot complain that the absence of a preliminary hearing denied him the opportunity more effectively to combat that proof.*

Defendant claims secondly that the statute under which he was convicted, 18 U.S.C. § 2315, is unconstitutional because courts have permitted juries to presume or infer knowledge of the stolen nature and interstate character from possession of recently stolen securities. This presumption, he claims, is unconstitutional under the doctrine of *Leary* v. *United States,* 395 U.S. 6 (1969). Although we see the presumption based on possession of stolen goods as qualitatively different from the presumption struck down in *Leary,* it is sufficient to note that this is an evidentiary question which defendant has waived along with his right to trial. Not having gone to trial, defendant cannot claim to have been prejudiced by a presumption that was never used. The government may have been able to come forward with direct proof that defendant knew the securities were stolen and that they had moved

* At argument, defendant claimed that *Coleman* v. *Alabama,* 399 U.S. 1 (1970), requires that a preliminary hearing be held. *Coleman* says that a defendant has a right to counsel when a preliminary hearing is held, but it does not require that a preliminary hearing be held in every case. 399 U.S. at 8.

in interstate commerce. The trial judge might not have charged the jury to consider the presumption. Defendant raises only a hypothetical claim, and we do not decide hypothetical cases.

Defendant's final claim is that the eighteen count indictment is "multiplicitous". He says that there were less than eighteen transactions and that the government split at least one transaction into two counts. Once again defendant's claim is mere supposition. Because two of the eighteen counts refer to transactions that occurred on the same date, the defendant says the government must be referring to the same transaction in each count. But the record at the time of sentencing reveals that the government was alleging that defendant used stolen securities as collaterial for eighteen separate loans. Although two loans were negotiated on the same day, the government claimed they were separate transactions involving two different securities. The indictment did not therefore split single transactions into multiple counts. We are not impressed by defendant's contention that since he was engaged in a single, though grand, scheme to defraud, he was guilty of but one offense.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1642

MARVIN T. KARGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner pleaded guilty in the United States District Court for the District of Massachusetts to eighteen counts charging violations of 18 U.S.C. 2315, which punishes the knowing pledging of stolen securities that are worth more than $500 and have moved in interstate commerce. He was sentenced to a total of twelve years' imprisonment.

Prior to the plea, petitioner had raised various claims, including (1) a right to a preliminary hear-

ing notwithstanding the intervening return of an indictment; (2) multiplicity in the indictment; and (3) the invalidity of Section 2315 because courts have permitted juries to draw the inference necessary for conviction upon finding that the defendant recently possessed the stolen securities. On direct appeal from the plea of guilty, petitioner sought to raise these contentions. The court affirmed the conviction, holding that the plea of guilty had waived the claims (Pet. App. A). This ruling was clearly correct.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 425590 658